



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO 88 OF 2017

JOHN KIPKEMBOI.....1ST APPELLANT

THALLMAX CONTRACTORS.....2ND APPELLANT

VERSUS

MORRIS KEDOLO.....RESPONDENT

JUDGMENT

1. The appeal herein arises from the judgment and the decree of the Senior Principal Magistrate's Court at Vihiga in Civil Suit No. 7 of 2016 delivered on the 18th July 2018. Liability was settled at 85%: 15 % in favour of the respondent against the appellants. General damages were awarded as follows - pain and suffering at Kshs 3,000,000.00 less 15 % contribution making a total of Kshs 2,550,000.00, loss of earning capacity at Kshs 3,600,000.00 less 15 % contribution making Kshs 3,060,000.00, special damages at Kshs 24,000.00 less 15% contribution making Kshs 20,400.00; with a grand total of Kshs 5,630,400.00.

2. The appellants aggrieved by the learned trial magistrate's decision on quantum, lodged an appeal vide a memorandum of appeal dated 14th August 2017. In their memorandum of appeal, the appellants raised five grounds of appeal which are as follows:

- a) That the learned trial magistrate grossly misdirected herself in treating the evidence and the submissions on quantum before her and consequently coming to a wrong conclusion on the same;
- b) That the learned trial magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the appellants;
- c) That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable;
- d) That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstance was excessive in the circumstances occasioning miscarriage of justice; and
- e) That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.

3. The respondent's case was that on the 24th October 2015 while he was riding motor cycle registration No KMCY 717Y along Mbale-Gisambai road, the 1st appellant negligently drove the 2nd appellant's motor vehicle that it violently knocked him causing him severe bodily injuries. He averred that due to the accident he sustained great loss and prayed for general damages for pain and suffering, loss of earning capacity, Kshs 200,000.00 for future medical expenses and special damages. He stated that he sustained the following injuries as a result of the accident - amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury. He produced as evidence copies of a discharge summary and treatment chits from the Vihiga Referral Hospital that confirmed that he had sustained the said injuries. That evidence was corroborated by Dr. Okombo, who testified that he had examined the respondent after the accident. He confirmed that the respondent had sustained the above injuries. He classified the injuries as grievous harm and assessed his incapacitation at 50%. He produced his medical report as evidence. In his submissions, the respondent advanced a sum of Kshs 3,000,000.00 for pain and suffering and a sum of Kshs 1,560,000.00 for loss of earning capacity, calculated at 13,000 x 12 x 30 x 1/3. He relied on the following authorities - *Ntulele Estate Transporters Ltd vs. Patrick Omutanyi Mukolwe* (2014) eKLR and *Cosmas Mutiso Muema vs. Kenya Road Transporters Ltd.* (2014) eKLR. The appellants on their part did not offer counter-evidence on quantum. In their written submissions at the trial court, the appellants argued that Kshs 600,000.00 was sufficient compensation for the respondent.

4. Directions were given that the appeal be disposed of by way of written submissions. Both sides have filed their respective written submissions, which I have read through and noted the arguments advanced.

5. In their submissions in support of the appeal, the appellants advanced a sum of Kshs 1,600,000.00 for pain and suffering and Kshs 1,539,732.00 calculated at 6,415x 20 x12. They relied on the following authorities - *Zipporah Nangila vs. Eldoret Express* (2016) eKLR, *Mary Kerubo Mabuka vs. Newton Mucheka & 3 Others* and *Bayusuf Freighters Limited vs. Patrick Mbatha Kyengo* (2014) eKLR. The respondent supported the judgment of the trial magistrate stating that the same was commensurate with the injuries sustained.

6. After considering the memorandum of appeal and the written submissions lodged herein, I am persuaded that the following are the issues for determination -

a) whether the trial court acted on wrong principles of law in making the award of damages; and

b) if (a) above is answered to the affirmative, which sum would be sufficient compensation.

7. The Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...’

8. In *Loice Wanjiku Kagunda vs. Julius Gachau Mwangi* CA 142/2003 the Court of Appeal held that: -

*‘We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Mariga V Musila* [1984] KLR 257).’*

9. The same was reiterated in the case of *Gitobu Manyara & 2 Others vs. Attorney General* [2016] eKLR, where the Court of Appeal held that –

*“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:*

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’

*In *Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. AM. Lubia and Olive Lubia* (1982 –88) 1 KAR 727 at p. 730 Kneller J.A. said: -*

*“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilango V. Manyoka* [1961] EA 705, 709, 713; *Lukenya Ranching and Farming Co-Operatives Society Ltd V. Kavoloto* [1970] EA 414, 418, 419. This Court follows the same principles.”*

*And in *Gicheru V Morton and Another* (2005) 2 KLR 333 this Court stated:*

‘In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled.’

*See also *Major General Peter M. Kariuki v Attorney General- Civil Appeal No. 79 of 2012.**

The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal.’

10. In the instant suit, the trial magistrate awarded Kshs 3,000,000.00 as damages for pain and suffering, which amount the appellant regards as inordinately high. The respondent agrees with the trial magistrate on the award.

11. The Court of Appeal observed in *Simon Taveta vs. Mercy Mutitu Njeru* [2014] eKLR that –

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

In *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR the court said that –

*“On the issue of damages, it is settled that the award of damages is within the discretion of the trial court and the Appellate court would only interfere on the particular grounds. These grounds were and are (a) that the court acted on wrong principles or that the award is so excessive or so low that no reasonable tribunal would have awarded or (b) that the court has taken into consideration matters which it ought not to have or left out matters it ought to have considered and in the result arrived at wrong decision. (See *Butler vs Butler* (1984) KLR 225.*

The assessment of damages in personal injury case by court is guided by the following principles: -

- 1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
- 2) The award should be commensurable with the injuries sustained.
- 3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
- 4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
- 5) The awards should not be inordinately low or high (See *Boniface Waiti & another Vs Michael Kariuki Kamau* (2007) eKLR.’

12. The respondent herein sustained the following injuries -amputation of the left leg below the knee, chest injury, bruises on the shoulder, back injury and crush injury. The doctor assessed incapacitation at 50 % due to the amputation. In *Kurawa Industries Limited vs. Dama Kiti & Another* [2017] eKLR an authority relied upon by the respondent the court stated that -

‘The scenario given by the above awards show that damages for amputation of one’s leg above the knee would range from Kshs.1.2 million to Kshs.2.5 million. The trial court awarded Kshs.2 million on 26.6.2015. I find that assessment not to be excessive. It is within the amounts awarded for similar injuries. There is the case of Samuel Musinga Mwatete (supra) where Kshs.1.5 million was awarded in 2012. The case of Patrick Mbatha Kyengo was decided in 2013. Kshs.1.6 million was awarded. An award of Kshs.2 million in 2015 cannot be excessive noting that Kshs.2.5 million was awarded in March 2014 in the case of Cosmas Mutiso Mwema (supra).’

13. In *Kipkoskei Tangus Tesot vs. Julius Kiprono Tanui* [2018] eKLR, the court when faced with an appeal where the respondent sustained similar injuries held that *“After considering those authorities and those cited by the respondent in the trial court, I find that the award of Kshs. 3,903,003.00 was manifestly excessive. The upshot of these considerations is that I find an award of Kshs. 2,500,000.00 as general damages is fair compensation for the injuries.”* Similarly, in the court in *Gilanis Supermarket & Another vs. Kennedy Swanya Mwayaka* [2018] eKLR said that -

‘I have considered the following authorities: Simon Ano Mua -vs- Kioga Mukwano t/a Kioga Mukwano Transporters & 2 Others (2013) eKLR and Cosmos Mutiso Muema -vs- Kenya roads Transporters (2014) e KLR. In the Cosmas Mutiso case, the injuries were more severe. A sum of Kshs. 2,500,000/= damages for pain and suffering were awarded. In the Simon Ano Mua case, a sum of Kshs.2 Million was awarded for similar injuries mainly amputation of the left leg below the knee. That was on the 30th August 2013 (Waweru J). In Geoffrey Mwaniki Mwinzi -vs- Ibero (K) Ltd & Another (2014) an award of Kshs.2 million was awarded for pain and suffering for more severe injuries including amputation of the leg and fracture of collar bone. That was on the 30th July 2014. Having taken the Respondent's injuries in this appeal and the respondents permanent incapacitation assessed at 40% and the future treatment needs and all attendant pains and costs, I do not find the trial magistrate's award of Kshs. 2,500,000/= to be inordinately high as to warrant this courts interference. I uphold the said award.’

14. And in *John Kinyua Murage & 2 Others vs. Joseph Onyango Obura* [2018] eKLR court held that -

‘...the appellants have argued that the award of Kshs. 2,500,000/=for pain and suffering is high therefore it should be reviewed downwards to Ksh. 1,500,000/=. They cited the case of Esther Ingolo vs. Swaleh Said Hamed Bilele and 2 others (2006) eKLR where the victim was awarded Ksh. 1,200,000. The respondent argued that the award should not be disturbed stating that the case cited by the appellants is more than 10 years old. The respondent relied on the case of Jackson Mutuku Ndeti vs. AO Bayusuf & Sons Ltd (2007) eKLR where an award of Ksh. 2,000,000/= was made for an amputated leg in 2007. I am persuaded by the arguments put forward by the respondent that the award on pain and suffering should not be disturbed.”

15. The respondent relied on the case of *Bayusuf Freighters Limited vs. Patrick Mbatha Kyengo* (2014) eKLR where the Court of Appeal made an award of Kshs 1,600,000.00 for similar injuries. It should be noted that the said decision was delivered in 2014. As stated in the case of *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR, the court in making an award for general damages must always consider the prevailing inflation rates.

16. From the above authorities, it is clear that the trial magistrate made an inordinately high award in view of the injuries sustained by the respondent. An award of Kshs 2,500,000.00 should have been sufficient compensation for pain and suffering.

17. The respondent stated in his submissions that he was 24-year-old *boda boda* operator at the time of the accident. He urged the court to adopt a minimum wage of Kshs 13,000.00 and a multiplier of 30 years in calculating the loss of future earnings. He prayed for an award of Kshs 1,560,000.00 for loss of future earnings. However, in his submissions in the appeal he prayed for loss of earning capacity. The appellants on their part submitted that the award be calculated at a minimum wage of Kshs 6,415.55 and a multiplier of 20 years. They prayed that the same be awarded at Kshs 1,539,600.00. They equally make reference to it as loss of earning capacity. The trial magistrate made an award of Kshs 3,060,000.00 adopting a wage of Kshs. 10,000.00 and a multiplier of 30 years. The award was made with respect to loss of future earnings. In his pleadings the respondent stated that he was a *boda boda* rider. However, he did not state how much he was earning per month. In his submissions, he stated that he was earning between Kshs 10,000.00 and Kshs. 15,000.00 monthly. He did not produce any evidence to prove the same.

18. It is proper that for the sake of the parties herein, a clarification be made that the award sought was for loss of earning capacity and not loss of future earnings. The distinction between loss of earning capacity and loss of future earnings was brought out in the case of *SJ vs. Francesco Di Nello & Another* [2015] eKLR where the Court of Appeal stated as follows:

“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved. This was the position enunciated in Fairley V John Thomson Ltd [1973] 2 Lloyd’s Law Reports 40 at pg. 14 wherein Lord Denning M.R. said as follows:

“It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”

19. In awarding damages under this head, the Court of Appeal in *Mumias Sugar Company Limited vs. Francis Wanalo* (2007) eKLR stated that

“...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

20. The said principles were envisaged in *Butler vs. Butler* (supra), where the Court of Appeal enumerated the principles to be considered in respect of a claim for loss of earning capacity as follows: -

- a) A person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour market or work, as well paid as before the accident are lessened by his injury;
- b) Loss of earning capacity is a different head of damages from actual loss of future earnings. The difference is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence whereas compensation for diminution of earning capacity is awarded as part of general damages;
- c) Damages under the heads of loss of earning capacity and loss of future earnings, which in English law were formerly included as an unspecified part of the award for pain, suffering and loss of amenity, are now quantified separately and no interest is recoverable on them;
- d) Loss of earning capacity can be a claim on its own, as where a claimant has not worked before the accident giving rise to the incapacity, or a claim in addition to another, as where the claimant was in employment then and/or at the date of the trial;
- e) Loss of earning capacity or earning power may and should be included as an item within general damages but where it is not so included it is not improper to award it under its own heading; and
- f) The factors to be taken into account in considering damages under the head of loss of earning capacity will vary with the circumstances of the case, and they include such factors as the age and qualifications of the claimant; his remaining length of working life; his disabilities and previous service, if any.

21. According to the medical report prepared by Dr. Okombo, the respondent sustained 50% disability. The appeal herein lies on the wage adopted and the multiplier used by the trial court. The trial court adopted Kshs 10,000.00 as the minimum wage. The appellants were of the view that the court ought to have adopted a minimum wage of Kshs 6,415. 55 as the respondent had not proved how much he was earning. They further urged in their submissions that the trial magistrate adopted the minimum wage yet a rider’s wage was not indicated in the wage guidelines of 2015 /2017. In his evidence, the respondent had stated that he was earning about Kshs 10,000.00 per month. In his submissions, the respondent advanced a sum of Kshs 13,000.00 being minimum wage. It is the appellants’ submission that the respondent ought to have furnished court with documentary evidence to prove his earnings before the accident.

22. In the case of *Nelson Rintari vs. CMC Group Ltd* (2015) eKLR the court held -

‘...I agree a wrong doer must accept the victim as he finds him. The respondent cannot therefore urge the court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's submissions are accepted this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further this would go against Article 159 (2) (d) of the constitution of Kenya 2010 which obliges courts to do justice without procedural technicalities...’

23. The Court of Appeal in *Jacob Ayiga Maruja & Another vs. Simeone Obayo* [2005] eKLR observed that -

‘We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.’

24. From the above cases it is clear that it is not necessary for one to avail documentary evidence to prove earnings.

25. Further it should be noted that the respondent did not mention in the proceedings that he was employed and salaried. In his submissions he stated that he was no longer able to engage in his *boda boda* business due to the injuries he sustained. The same was noted by the trial court in its judgment. The trial court in making an award for loss of earning capacity adopted a multiplier-multiplicand formula. She adopted a minimum wage for the multiplicand. In *Oyugi Judith & Another vs. Fredrick Odhiambo Ongong & 3 Others* [2014] eKLR the court observed that *“Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time.”* In the instant case the respondent was not employed and further the wages guidelines do not make any provision for a *boda boda* cyclist. In *John Wamai and Two Other Vs. Jane Kituku Nziva and Another* (2017) eKLR the court stated as follows: -

‘The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.’

26. From the evidence adduced in court, it was not clear as to how much the respondent was earning and it is thus the application of the multiplier formula was unsafe in the circumstance.

27. In *Oyugi Judith & Another V Fredrick Odhiambo Ongong & 3 Others* [2014] eKLR the Court stated that –

*‘Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the magistrate to rely on “municipal rates.” The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle. As the income could not be ascertained with precision, the court ought to have awarded a global sum. In this respect I would adopt the reasoning by Ringera J., in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* quoted by Koome J., in *Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003*[2007] eKLR where he expressed the following view;*

‘The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.’

*The same principle was adopted in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR where Nambuye J., stated that: As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books. In sum I find and hold that the multiplier approach was wholly inappropriate in light of the paucity of evidence. Taking the aforesaid principles into account, I award the dependants of Eric Okoth Obambla and Collins Ochieng Obambla the sum of Kshs. 700,000.00 each.”*

28. In *Alpharama Limited vs. Joseph Kariuki Cebzon* [2017] eKLR the court said of assessment of damages for diminished earning capacity: -

‘...To assess loss of earning capacity in the future, the court must consider to what extent the claimant’s ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the “multiplicand”), which is the annual loss of earnings. The multiplicand will then be multiplied by a “multiplier”. The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired”. According to the bank statements produced, the plaintiff

indeed had money flow into her account. The flow showed a steady growth. While taking an average for the entire period of banking shown in the bank statements may not be the most accurate formula to determine the monthly income that alone should not be the basis to conclude that ascertaining a monthly income is difficult and therefore the court is unable to assess the damage. On the same vein the multiplier approach is just but one aid the court applies in assessment of damages. It is not the only one. The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors. In this matter, the fact that the plaintiff has been rendered legless for life, her age at the time of accident and therefore the period she has been consigned to live with reduced mobility, her qualification at the time and that she might not effectively fit back into the job of a port clerk, are relevant factors to be taken into account.’

29. In *Mumias Sugar Company Limited vs. Francis Wanalo* [2007] eKLR the Court of Appeal observed that –

‘There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability...In the instant case, the loss of earning capacity was claimed as part of general damages. The respondent was not working at the date of the trial his apprenticeship having expired by effluxion of time about 3½ years before the commencement of the trial. He was training for general mechanical fitting and mechanical engineering. The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent incapacity was assessed at 15% by Dr. Juma and at 10% by Dr. Raburu. Thus, the right hand lost a maximum of 15% of its function. Plaintiff was a farmer at the time of the trial. All what he said at the trial was that he had not been able to get a similar job as he was doing before the accident. There was no evidence however that because of disability he could not do the job for which he was being trained – mechanical fitting. Having regard to the degree of incapacity that the respondent suffered the risk of the respondent not being able to find employment in the labour market was not substantial. It was minimal. The trial Judge in assessing the multiplicand of Shs. 7,000/= per month took into account that the appellant was earning Shs. 8,300/= p.m. during apprenticeship and applied a multiplier of 24. Having regard to the degree of incapacity that the respondent suffered, it was inappropriate to assess the loss of earning capacity on the multiplicand/ multiplier basis.’

30. From having assessed and considered the decisions in the cases above, it is my conclusion that the circumstances of the case did not warrant the use of the multiplier formula as the earnings of the respondent could not be established. It is thus my finding that the trial magistrate erred in applying the multiplier method which in turn gave an erroneous estimate, an amount that was inordinately high in the circumstances. It is also my view that an amount of Kshs 1,500,000.00 would have been a suitable award in the circumstance.

31. In the upshot, I shall allow the appeal herein, and reduce the quantum of damages awarded, and award for pain and suffering Kshs 2,500,000.00 and for loss of earning capacity Kshs 1,500,000.00. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April 2019

W MUSYOKA

JUDGE